

1 SUPERIOR COURT OF THE STATE OF CALIFORNIA

2 FOR THE COUNTY OF LOS ANGELES

3 DEPARTMENT NO. 324 HON. ERNEST M. HIROSHIGE, JUDGE

4 BUNKER HILL TOWERS CONDOMINIUM
5 ASSOCIATION, ETC., ET AL.,

6 PLAINTIFFS,

7 VS.

NO. C 638 821

8 THE PRUDENTIAL INSURANCE
9 COMPANY OF AMERICA, ET AL.,

10 DEFENDANTS.

11 REPORTER'S DAILY TRANSCRIPT
12 APRIL 2, 1992 - A.M. SESSION13 VOLUME 24
14 PAGES 2805 TO 2930, INCL.

15 APPEARANCES:

16 FOR THE PLAINTIFFS:

17 GILBERT L. PURCELL, ESQ.
18 ERIC J. SCHINDLER, ESQ.
19 MORENO, PURCELL & SCHINDLER
20 227 BROADWAY, SUITE 200
21 SANTA MONICA, CALIFORNIA 90401
22 (310) 395-9299

- AND -

23 RAYMOND P. BOUCHER, ESQ.
24 520 BROADWAY, SUITE 670
25 SANTA MONICA, CALIFORNIA 90401
26 (310) 395-633627 FOR THE DEFENDANT
28 W.R. GRACE & COMPANY:GEORGE A. MANFREDI, ESQ.
DAVID T. BIDERMAN, ESQ.
PERKINS COIE
NINTH FLOOR
1999 AVENUE OF THE STARS
LOS ANGELES, CALIFORNIA 90067
(310) 788-3230

- AND -

THOMAS R. JONES, ESQ.
CABILL GORDON & REINDEL
80 PINE STREET
NEW YORK, NEW YORK 10005DAVID E. ROBERSON, CSR #2488
OFFICIAL REPORTER

COPY

1 LOS ANGELES, CALIFORNIA * MONDAY, APRIL 6, 1992
2 DEPARTMENT NO. 324 HON. ERNEST M. HIROSHIGE, JUDGE
3 10 A.M.

4 (THE FOLLOWING PROCEEDINGS WERE HELD IN
5 OPEN COURT OUT OF THE PRESENCE OF THE
6 JURY:)

7 THE COURT: ALL RIGHT. WE'RE READY TO COMMENCE
8 OUTSIDE THE PRESENCE OF THE JURY. THERE WERE TWO POINTS
9 AND AUTHORITIES SUBMITTED REGARDING THIS WITNESS. HOW
10 SOON ARE WE GOING TO GET TO THIS ISSUE?

11 MR. BOUCHER: WE'RE ACTUALLY IN THE THICK OF IT
12 NOW, YOUR HONOR.

13 THE COURT: WELL, WEREN'T YOU GOING THROUGH SLIDES?

14 MR. BOUCHER: THAT'S CORRECT.

15 THE COURT: ARE YOU THROUGH WITH THE SLIDES?

16 MR. BOUCHER: WE HAVE GOT SOME ADDITIONAL SLIDES,
17 SOME OF WHICH IN PART GO DIRECTLY TO THIS POINT. I ASKED
18 SOME GENERAL QUESTIONS DURING THE SLIDE PRESENTATION, AS
19 THE COURT MAY RECALL, AND MR. MANFREDI OBJECTED ON
20 HEARSAY GROUNDS TO JUST GENERAL BACKGROUND QUESTIONS.
21 AND THE COURT ASKED THAT I GO ON TO ANOTHER TOPIC, WHICH
22 I DID, AND I STOPPED THE SLIDES AT A POINT WHERE THERE
23 ARE A COUPLE OF MORE I THINK THAT WE CAN GO THROUGH.

24 BUT CERTAINLY SOME OF THESE, SOME OF THE
25 REMAINING SLIDES GO DIRECTLY TO AT LEAST PART OF THIS
26 POINT OR AT LEAST THE BREADTH OF THE POINT IN TERMS OF
27 THE WAY THE DEFENSE, AS I UNDERSTAND IT, IS ARGUING.

THE COURT: WELL, WEREN'T YOU TRYING TO GO INTO THE

1 ISSUE OF IDENTIFYING MONOKOTE-3, HIS PAST EXPERIENCES
2 WHERE HE'S TAKEN DUST SAMPLES AND IT HAS BEEN ANALYZED IN
3 OTHER CASES?

4 MR. BOUCHER: THAT'S CORRECT.

5 THE COURT: AND IT'S PROVED TO BE MONOKOTE-3?

6 MR. BOUCHER: THAT'S CORRECT.

7 THE COURT: I THINK THAT IS A DISTINCT ISSUE FROM
8 THE OTHER ISSUE HERE, THE ISSUE THAT WE HAVE AS TO
9 WHETHER OR NOT THE LAB RESULTS IN THIS CASE COME IN FOR
10 THE TRUTH OF THE MATTER, WHICH IS MY RECOLLECTION OF WHAT
11 THE ISSUE WAS, I THINK, ON THE ISSUE OF HIS BEING ABLE TO
12 BE FAMILIAR WITH MONOKOTE-3 AND BEING ABLE TO IDENTIFY IT
13 AND ITS PROPERTIES.

14 THE FACT THAT IT IS ANALYZED IN OTHER CASES
15 AND HE'S FAMILIAR WITH THE PROPERTIES, WHAT IT LOOKS
16 LIKE, WHAT IT FEELS LIKE, AND IT WAS LATER IDENTIFIED,
17 THAT COULD BE RELEVANT TO HIS EXPERTISE ABOUT RECOGNIZING
18 CERTAIN CHARACTERISTICS OF MONOKOTE-3. BUT IN THIS CASE
19 ITSELF THERE IS A DIFFERENT ISSUE AS TO WHETHER OR NOT WE
20 GET THE LAB RESULTS IN FOR THE TRUTH OF THE MATTER THAT
21 IT IS MONOKOTE-3 OR THAT A PERCENTAGE OF ASBESTOS IS X.
22 THAT SEEMS TO BE THE DIFFERENT ISSUE, TO ME.

23 MR. BOUCHER: WELL, I WOULD AGREE WITH THE COURT
24 ESSENTIALLY. HOWEVER, YOUR HONOR, I THINK THAT THERE ARE
25 TWO ISSUES IN TERMS OF THE QUESTIONING HERE -- ONE OF
26 WHICH WE BELIEVE IS VERY CLEAR AND THE SECOND OF WHICH
27 THE COURT HAS JUST IDENTIFIED -- THE FIRST BEING, CAN
THIS EXPERT, MR. HATFIELD, WHO TOOK THE DUST SAMPLES,

1 RELY UPON THE MILLETTE REPORT IN RENDERING HIS OPINION
2 THAT THERE IS IN FACT CONTAMINATION, NOT ONLY BASED UPON
3 THE REPORT ITSELF BUT ON HIS PRIOR EXPERIENCE AND
4 ANALYSIS THAT HAS BEEN PERFORMED IN OTHER CASES THAT HE'S
5 BEEN INVOLVED IN?

6 THAT IS ONE QUESTION THAT WE BELIEVE
7 CLEARLY HE'S PERMITTED TO GO THAT FAR. THE EVIDENCE CODE
8 INDICATES THAT AN EXPERT CAN RELY UPON EVIDENCE, WHETHER
9 OR NOT IT IS ADMISSIBLE, IN RENDERING THEIR OPINIONS. SO
10 IN TERMS OF HIM BEING ABLE TO TESTIFY THAT HE TOOK SOME
11 TESTS, DID SOME DUST SAMPLING, HAD THAT ANALYZED, AND
12 BASED UPON THAT ANALYSIS, AS WELL AS HIS BACKGROUND AND
13 EXPERIENCE, HE FEELS THAT THIS PLACE IS CONTAMINATED, WE
14 DON'T THINK THERE IS ANY QUESTION THAT HE CAN GO THAT
FAR.

15 THE NEXT QUESTION BECOMES, DO THE RESULTS
16 FROM THE MILLETTE LAB COME INTO EVIDENCE FOR THE TRUTH OF
17 THE MATTER, THAT IS, WHAT THE ACTUAL RESULTS SHOW, AS
18 OPPOSED TO JUST COMING IN AS THE BASIS FOR SOME OF HIS
19 OPINIONS RELATING TO CONTAMINATION? AND THAT IS I THINK
20 WHAT IS ADDRESSED BY THE BRIEFS THAT WE PUT FORTH.

21 OUR UNDERSTANDING OF -- AND OBVIOUSLY MR.
22 MANFREDI CAN SPEAK TO IT BETTER THAN I -- BUT OUR
23 UNDERSTANDING OF THE DEFENSE OBJECTION IS THAT THEY DON'T
24 FEEL THEY HAVE AN OBJECTION TO ANY TESTIMONY BY MR.
25 HATFIELD ABOUT THE CONTAMINATION OR EVEN THE FACT THAT HE
26 HAD THESE RESULTS ANALYZED, AND THAT HE BASED HIS
27 OPINIONS IN PART UPON THESE RESULTS.

1 AND SO I THINK THAT THERE ARE TWO SPECIFIC
2 ISSUES BEFORE THE COURT.

3 THE COURT: WELL, ON THE ISSUE OF WHETHER OR NOT
4 HIS PREVIOUS EXPERIENCE WITH MONOKOTE-3 INVOLVED HIS
5 OBSERVATIONS OF THE PRODUCT UNDER VARIOUS CONDITIONS
6 PHYSICALLY, AND OBSERVING ITS PROPERTIES, PHYSICAL
7 PROPERTIES, PLUS THE LAB RESULTS, IF THEY CONFIRM THAT IT
8 IS MONOKOTE-3 AND THERE IS ASBESTOS, WHAT ARE YOU
9 UTILIZING THAT FOR? IS THAT FOR THE ISSUE OF HIS OPINION
10 THAT THERE IS HAZARD?

11 MR. BOUCHER: THAT THERE IS CONTAMINATION, CORRECT.

12 THE COURT: SO HIS OPINION THEN, HIS OPINION THAT
13 THERE IS HAZARD WOULD HAVE TO BE IN THE FORM OF SOMEWHAT
14 OF A HYPOTHETICAL QUESTION. HE'D HAVE TO ASSUME CERTAIN
15 THINGS, HIS OBSERVATIONS, HIS PAST EXPERIENCE. WOULD HE
16 HAVE TO ASSUME THE TRUTH OF THE LAB RESULTS?

17 MR. BOUCHER: HE'D HAVE TO RENDER HIS OPINION BASED
18 IN PART UPON THE LABORATORY RESULTS WHICH HE'S --

19 THE COURT: ALL RIGHT. SO WHAT DO YOU PROVIDE ME
20 IN YOUR POINTS AND AUTHORITIES THAT TELLS ME THAT THE LAB
21 RESULTS COME IN FOR THE TRUTH OF THE MATTER?

22 MR. BOUCHER: THOSE ARE TWO DIFFERENT THINGS, YOUR
23 HONOR.

24 UNDER THE EVIDENCE CODE, I BELIEVE IT IS
25 SECTION 801, MR. HATFIELD CAN TESTIFY THAT HE TOOK SOME
26 DUST SAMPLES. HE SENT THEM OFF FOR LABORATORY ANALYSIS;
27 THAT THE LABORATORY ACTUALLY DID THE FIBER COUNTING. AND
HE HAS REVIEWED THOSE RESULTS AND, BASED UPON THOSE

1 RESULTS, IT IS HIS OPINION, AS WELL AS HIS BACKGROUND AND
2 EXPERIENCE, IT IS HIS OPINION THAT THERE IS CONTAMINATION
3 IN THE BUILDING.

4 HE CAN GO THAT FAR UNDER THE EVIDENCE CODE
5 REGARDLESS OF WHETHER RESULTS COME IN FOR THE THE TRUTH
6 OF THE MATTER ASSERTED. AND THE EVIDENCE CODE SAYS
7 CLEARLY THAT AN EXPERT CAN RELY UPON SUCH RESULTS,
8 WHETHER OR NOT THEY ARE THEMSELVES ADMISSIBLE.

9 AND WE'VE CITED A COUPLE OF CASES, ONE OF
10 WHICH WE BELIEVE IS DIRECTLY ON POINT. AND THAT IS THE
11 WILLIAMS VS. VOLKSWAGEN CASE, WHERE THE COURT FOUND THAT
12 AN EXPERT WHO, RIGHT BEFORE TRIAL AND AFTER HIS
13 DEPOSITION WAS TAKEN, IN FACT HAD A LABORATORY PERFORM A
14 STRESS TEST ON A PART OF THE VOLKSWAGEN, AND THEN
15 RENDERED HIS OPINION BASED UPON THE LABORATORY ANALYSIS
16 AND CHEMICAL ANALYSIS FROM THAT STRESS TEST. THE COURT
17 ALLOWED NOT ONLY HIS OPINIONS BASED UPON THOSE TESTS, BUT
18 ALLOWED THE TEST RESULTS THEMSELVES IN.

19 THE CASE CITED BY THE DEFENDANTS, WHICH IS
20 CONTINENTAL AIRLINES, IS DISTINGUISHABLE. BUT FROM THE
21 STANDPOINT OF THE VERY FIRST ISSUE, AND THAT IS THAT MR.
22 HATFIELD CAN TESTIFY THAT HE HAS REVIEWED THE RESULTS OF
23 THE TESTS AND BASES HIS OPINIONS IN PART UPON THOSE TEST
24 RESULTS, IN CONTINENTAL AIRLINES THE COURT SPECIFICALLY
25 SAID THAT AN EXPERT, EVEN THOUGH TWO OTHER INDIVIDUALS
26 PERFORMED THE ACTUAL ANALYSIS, MAY RELY UPON THOSE
27 FIGURES SUBMITTED TO HIM IN FORMING HIS EXPERT OPINIONS
AND TO TESTIFY THAT HE RELIED UPON THEM.

1 NOW, THE IN THE CONTINENTAL CASE --

2 THE COURT: WELL, IN WILLIAMS VS. VOLKSWAGEN THERE
3 WAS A STRESS TEST ON A PORTION OF THE VEHICLE?

4 MR. BOUCHER: THAT'S CORRECT.

5 THE COURT: WAS THAT LATER ADMITTED INDEPENDENTLY
6 THROUGH THE PERSON WHO PERFORMED THE STRESS TEST --

7 MR. BOUCHER: NO.

8 THE COURT: -- IN THE CASE?

9 MR. BOUCHER: NO. THEY WERE PERMITTED THROUGH THE
10 EXPERT WHO HAD THE STRESS TEST PERFORMED.

11 NOW, THE COURT --

12 THE COURT: WELL, I MEAN LOOKING AT 801, YOU HAVE
13 JUST IN PLAIN LANGUAGE OF THE SECTION, YOU HAVE CERTAINLY
14 AN ARGUMENT THAT SAYS IT MAY BE PERCEIVED BY OR BE
15 PERSONALLY KNOWN TO THE WITNESS OR MADE KNOWN TO HIM AT
16 OR BEFORE THE HEARING, WHETHER OR NOT ADMISSIBLE. IT IS
17 OF A TYPE THAT REASONABLY MAY BE RELIED UPON BY AN
18 EXPERT.

19 SO CERTAINLY ON ITS FACE IF HE'S AN EXPERT
20 IN THIS AREA OF CONTAMINATION, THEN HE COULD REASONABLY
21 RELY ON LAB RESULTS FROM A REPUTABLE LAB AS FAR AS HE WAS
22 CONCERNED, EVEN IF THE LAB RESULTS DON'T COME IN, I MEAN
23 JUST LOOKING AT THE FACE OF THE STATUTE.

24 MR. BIDERMAN: YOUR HONOR, THE STATUTE HAS BEEN
25 INTERPRETED AND I REFER THE COURT TO -- IT IS ACTUALLY
26 THE POCKET PART OF THE JEFFERSON BENCHBOOK AND THE CASES
27 THAT WE'VE CITED. THE CONTINENTAL CASE IS ONLY ONE.
THERE IS MOSESIAN, M-O-S-E-S-I-A-N, VS. PENWALT AND

1 COLEMAN, AND AGAIN IT IS 384 OF THE -- DISCUSSED AT PAGE
2 384 OF THE POCKET PART, I BELIEVE, OF THE JEFFERSON
3 BENCHBOOK, SECTION 29.4.

4 JEFFERSON STATES THAT WHILE AN EXPERT CAN
5 RELY ON OTHER THINGS, AN EXPERT CANNOT SET FORTH THE
6 OPINIONS OF ANOTHER EXPERT IN PROVIDING HIS TESTIMONY
7 BECAUSE THERE IS THE RISK, OF COURSE, THAT THOSE
8 OPINIONS, WHICH ARE NEVER ADMITTED INTO EVIDENCE, WILL BE
9 DEEMED BY A JURY TO BE OFFERED FOR THEIR ACTUAL TRUTH,
10 WHEN THEY CAN'T BE ADMITTED FOR THE TRUTH UNLESS THERE IS
11 SOME INDEPENDENT BASIS FOR THEIR ADMISSION.

12 I'M SPECIFICALLY READING FROM JEFFERSON ON
13 DIRECT EXAMINATION: AN EXPERT MAY NOT SET FORTH THE
14 OPINIONS OF OTHER EXPERTS TO BOLSTER THE WITNESS'S
15 OPINION, SINCE OTHER OPINIONS ARE BEING OFFERED FOR THE
16 TRUTH AND CONSTITUTE INADMISSIBLE HEARSAY. AND THAT IS
17 PRECISELY WHAT PLAINTIFFS WOULD HAVE MR. HATFIELD DO IN
18 THIS CASE.

19 ALL MR. HATFIELD HAS DONE IS DO THE
20 VACUUMING. AND THEN IF PLAINTIFFS THEN ARE PERMITTED TO
21 ACTUALLY HOLD UP THIS CHART AND RECITE THE VARIOUS COUNTS
22 AND ANALYSES THAT WERE PREPARED BY MR. MILLETTE, ANOTHER
23 EXPERT WHO IS NOT AVAILABLE, THAT IS ESSENTIALLY THE
24 INTRODUCTION OF INADMISSIBLE HEARSAY THROUGH MR.
25 HATFIELD.

26 THAT IS PRECISELY WHAT JEFFERSON SAID IS
27 NOT PERMITTED IN CIRCUMSTANCES SUCH AS THIS, PARTICULARLY
WHETHER THERE WILL NEVER BE A BASIS FOR BRINGING IN THE

1 UNDERLYING CASES. AGAIN I REFER THE COURT TO THE
2 JEFFERSON BENCHBOOK. IT REALLY DISCUSSES THAT QUITE
3 THOROUGHLY AND QUITE EMPHATICALLY, THAT ONE EXPERT CANNOT
4 TESTIFY IN DETAIL ABOUT ANOTHER EXPERT'S OPINIONS. WE
5 CITED TO THE COURT ALSO THE GRIMSHAW CASE FOR THAT
6 PROPOSITION.

7 SO, ONE, YOUR HONOR WE DISAGREE WITH THE
8 PLAINTIFF'S CONTENTION THAT MR. HATFIELD CAN RELY UPON
9 INADMISSIBLE HEARSAY OF DR. MILLETTE IN GIVING HIS
10 OPINIONS, BECAUSE THAT IS, AS THE COURT STATED ON FRIDAY,
11 ESSENTIALLY A ONE TO ONE RELATIONSHIP. ALL MR. HATFIELD
12 HAS DONE IS DO THE VACUUMING. HE WOULD THEN TESTIFY
13 ABOUT CONTAMINATION BASED NOT UPON HIS VACUUMING, BUT
14 BASED UPON AN ANALYSIS DONE BY ANOTHER EXPERT.

15 SO AGAIN, ONE, WE DON'T THINK THERE SHOULD
16 BE ANY RELIANCE ON THESE INADMISSIBLE OPINIONS OF DR.
17 MILLETTE. NUMBER TWO, YOUR HONOR, THAT THE OPINIONS
18 THEMSELVES DO NOT COME INTO EVIDENCE IF RELIED UPON.
19 EVEN THE CASE THAT PLAINTIFFS CITE, THE WILLIAMS CASE,
20 DOES NOT HOLD THAT SIMPLY BECAUSE AN EXPERT RELIES ON
21 SOMETHING, IT THEN COMES IN FOR AFFIRMATIVE EVIDENCE.

22 AND I ALSO NOTE, YOUR HONOR, THAT IN THE
23 WILLIAMS CASE IT WAS A METALLURGICAL EXPERT WHO RELIED
24 UPON A STRESS TEST. THIS METALLURGICAL EXPERT HAD DONE
25 HIS OWN ANALYSIS OF THE PART, AND THAT STRESS TEST WAS
26 DEEMED TO BE A NON-CONTROVERSIAL COMPUTATION, WHICH IS
27 EXACTLY THE OPPOSITE OF WHAT WAS DONE HERE BY DR.
MILLETTE, WHICH AS THE COURT KNOWS FROM THE

1 CROSS-EXAMINATION OF DR. LONGO, IT IS EXTREMELY
2 CONTROVERSIAL, THE ENTIRE DUST SAMPLING PROTOCOL.

THE FACT THAT IT HAS NOT BEEN APPROVED BY
4 EITHER THE E.P.A. OR ANY STANDARDIZED TESTING
5 ORGANIZATION, PRECISELY WHAT GOES INTO DOING THE DUST
6 SAMPLING, WHETHER THERE IS HYDROCHLORIC ACID ADDED TO THE
7 LIQUID THAT IS APPLIED TO THE DUST, WHETHER THERE IS ANY
8 SEDIMENT OBSERVED IN THE TEST TUBE, THE INTENSITY OF THE
9 SONICATION, HOW THE ALIQUOT SAMPLE IS TAKEN OUT, ALL OF
10 THAT IS NOT DESCRIBED IN THE DOCUMENT THAT PLAINTIFFS
11 ATTEMPT TO RELY UPON.

12 AND WE HAVE NO OPPORTUNITY TO CROSS EXAMINE
13 THE WITNESS ABOUT THAT, AND IT IS A FUNDAMENTAL PART OF
14 THE ANALYSIS. IT IS NOT A NONCONTROVERSIAL COMPUTATION,
SUCH AS THE CASE IN THE WILLIAMS COURT.

16 THE COURT: DO THE PLAINTIFFS INTEND TO SEEK THE
17 LAB RESULTS INDEPENDENTLY OF MR. HATFIELD IN THIS CASE?

18 MR. BOUCHER: NO, YOUR HONOR, ALTHOUGH WE DO HAVE
19 THE CUSTODIAN OF RECORDS FROM THE LABORATORY HERE TO LAY
20 A FOUNDATION, IF NECESSARY. BUT NO, DR. LONGO TESTIFIED
21 ABOUT SONICATION. MR. HATFIELD IN HIS DEPOSITION WAS
22 EXTENSIVELY EXAMINED ABOUT THE VERY ISSUES THAT MR.
23 BIDERMAN JUST RAISED WITH THE COURT.

24 THE COURT: WHAT WOULD THE CUSTODIAN OF RECORDS BE
25 ABLE TO TELL FROM THE DOCUMENT? WOULD YOU BE ABLE TO
26 TELL WHAT METHOD WAS UTILIZED TO ANALYZE?

27 MR. BOUCHER: YES. THE CUSTODIAN OF RECORDS FROM
THE LABORATORY ACTUALLY PERFORMED QUALITY CONTROL ON THE

1 SAMPLES AS WELL FROM THE LABORATORY, AND HE WILL BE ABLE
2 TO TESTIFY ABOUT THE METHOD THAT WAS USED AND WHAT THE
3 RESULTS, JUST SIMPLY HOW THE RESULTS WERE OBTAINED.

4 BUT AGAIN, WE DON'T THINK IT NEEDS TO GO
5 THAT FAR. MR. HATFIELD, AS IN WILLIAMS, CAN TESTIFY
6 ABOUT THESE -- THEIR OBJECTIVE FACTS. ALL A MICROSCOPIST
7 DOES IS LOOK UNDER A MICROSCOPE AND COUNT. THAT'S ALL
8 MILLETTE DOES. THEY LOOK UNDER A MICROSCOPE AND THEY
9 COUNT STRUCTURES. IN FACT, MR. HATFIELD HAS VERIFIED.
10 WE HAD HIM THIS WEEKEND ACTUALLY GO TO THE MILLETTE LAB
11 AND LOOK AT THE ASBESTOS FIBERS AND COUNT FOR HIMSELF AND
12 LOOK AT THE VERMICULITE HIMSELF, WHICH HE'S QUALIFIED TO
13 DO AND IN FACT DID.

14 ALL THE MICROSCOPIST DOES IS THE SAME THING
15 THAT WAS PERFORMED IN WILLIAMS, AND THAT IS CALCULATIONS.
16 THEY ARE OBJECTIVE FACTS. THEY ARE NOT OPINIONS. AND
17 THE CASES THAT HAVE HELD OPINIONS CAN'T COME IN GO
18 SOMETHING LIKE THIS, YOUR HONOR. YOU HAVE A DOCTOR ON
19 THE STAND WHO HAS X-RAYS ANALYZED. AND HE TESTIFIES
20 ABOUT HIS OPINIONS ABOUT THE X-RAYS, HE THEN HAS THE
21 ENTIRE STAFF AT STANFORD LOOK AT THE X-RAYS.

22 AND HE TELLS THE JURY: I HAD THE ENTIRE
23 STAFF AT STANFORD LOOK AT THE X-RAYS AND THEY SAID THEY
24 COULD NOT FIND ANYTHING IN THESE X-RAYS EITHER. WELL,
25 THERE YOU'RE GETTING IN THE OPINIONS OF OTHER EXPERTS
26 ABOUT HOW THEY INTERPRETED THE X-RAYS THEMSELVES, AS
27 OPPOSED TO SIMPLE LABORATORY SCIENTIFIC ANALYSIS. DR.
MILLETTE DOES NOT IN HIS REPORT GIVE AN OPINION ABOUT

1 CONTAMINATION. HE DOES NOT RENDER AN OPINION ABOUT THE
2 SIGNIFICANCE OF THE THE RESULTS.

3 ALL HE DOES IS COUNT THE STRUCTURES AND
4 PROVIDE THE LABORATORY STRUCTURE COUNTS. IT IS THEN MR.
5 HATFIELD WHO CAN REVIEW THE STRUCTURE COUNTS AND RENDER
6 OPINIONS ABOUT CONTAMINATION AND RENDER OPINIONS ABOUT
7 THE SIGNIFICANCE OF CONTAMINATION BASED ON WHAT HE SAW
8 AND BASED UPON THAT ANALYSIS, AND IT IS JUST A SCIENTIFIC
9 CALCULATION.

10 AND UNDER SECTION 801, WHETHER OR NOT THE
11 COURT FINDS THAT THE ACTUAL COUNTS THEMSELVES ARE
12 ADMISSIBLE, CERTAINLY HIS RELIANCE UPON THE FACT THAT HE
13 HAD THEM ANALYZED IS ADMISSIBLE. MOREOVER, IT IS
14 PERMISSIBLE TO SHOW THE COUNTS TO THE JURY. AND IF THE
15 COURT FINDS THAT THERE IS NOT A SUFFICIENT BASIS FOR THE
16 COUNTS THEMSELVES TO COME IN AS SCIENTIFIC EVIDENCE, THEN
17 A LIMITING INSTRUCTION IS APPROPRIATE. AND THE APPELLATE
18 COURTS HAVE CLEARLY GONE THAT SUCH IS AN APPROPRIATE
19 VEHICLE FOR DEALING WITH THAT PROBLEM.

20 SO THE BOTTOM LINE IS, YOUR HONOR, THAT
21 ONE, WE BELIEVE THAT AS A MICROSCOPIST SIMPLY COUNTING
22 THE STRUCTURES THEMSELVES AND LISTING THE AMOUNT OF
23 STRUCTURES SEEN UNDER THE MICROSCOPE, IT IS NO DIFFERENT
24 THAN WILLIAMS, AND THOSE RESULTS CAN ACTUALLY COME IN.

25 IF THE COURT FINDS THAT THE RESULTS
26 THEMSELVES DON'T COME IN BASED UPON THAT, THEN CERTAINLY
27 UNDER SECTION 801 OF THE EVIDENCE CODE MR. HATFIELD CAN
RENDER HIS OPINIONS ABOUT WHAT HE REVIEWED AND THE FACT

1 THAT THEY ARE BASED UPON THIS ANALYSIS THAT HE HAS
2 PERFORMED.

3
4 FINALLY, IF NECESSARY WE CAN LAY THE
5 FOUNDATION THROUGH MR. HATFIELD, BASED ON THE FACT THAT
6 WE HAD HIM THIS WEEKEND GO BACK TO THE LABORATORY ITSELF
7 AND ACTUALLY LOOK AT THE RESULTS HIMSELF TO MAKE THE
8 COUNTS AND TO VERIFY THE COUNTS; AND THAT FINALLY, WE
9 HAVE THE CUSTODIAN OF RECORDS HERE IF THAT IS NECESSARY.

10 THE COURT: SO HE'S CAPABLE OF GIVING TESTIMONY AS
11 TO COUNTS HIMSELF?

12 MR. BOUCHER: THAT'S CORRECT. WHAT HAPPENS, YOUR
13 HONOR, IS UNDER THE T.E.M. ANALYSIS THE MICROSCOPIST
14 LOOKS UNDER THE MICROSCOPE AND IDENTIFIES THE STRUCTURES.
15 AND THEN AS THE COURT HEARD FROM PREVIOUS EXPERTS, THAT
16 IS, A DEFACTION EX-RAY DISPERSON ANALYSIS IS PERFORMED
17 WHICH SHOWS THAT THERE IS AN ASBESTOS FIBER, THE TYPE OF
18 FIBER, AND THAT IT IS VERMICULITE; AND THAT MR. HATFIELD,
19 SPECIFICALLY TO DEAL WITH THIS, WENT TO THE LABS, SAW THE
20 ASBESTOS STRUCTURES THEMSELVES.

21 MR. BIDERMAN: A NUMBER OF POINTS HAVE BEEN RAISED,
22 YOUR HONOR. I'M JUST GOING TO TRY TO ADDRESS THEM IN
23 SERIES.

24 THE FIRST IS -- AND THE CASES ARE SO
25 UNEQUIVOCAL ON THIS, YOUR HONOR, THAT I AGAIN REQUEST
26 THAT THE COURT LOOK AT THEM, THE EVIDENCE BENCHBOOK AND
27 CASES WE'VE CITED. GRIMSHAW, ONE CANNOT USE AN EXPERT AS
A VEHICLE FOR BRINGING IN ANOTHER EXPERT'S OPINION, WHICH
IS EXACTLY WHAT IS DONE HERE.

1 MR. MILLETTE REACHED AN OPINION THAT THERE
2 WERE X NUMBER OF FIBERS IN THESE VARIOUS SAMPLES THAT
3 WERE TAKEN. YOU CANNOT USE THAT INADMISSIBLE HEARSAY,
4 PRESENT THAT TO THE JURY IN ANY DETAIL WHEN THERE IS NO
5 FOUNDATIONAL BASIS FOR HAVING THAT EVIDENCE ADMITTED IN
6 AND OF ITSELF. AGAIN, THE GRIMSHAW VS. FORD MOTOR
7 COMPANY, AN EXPERT MAY NOT TESTIFY AS TO THE DETAILS OF
8 MATTERS WHICH ARE OTHERWISE INADMISSIBLE.

9 HE MAY NOT UNDER THE GUISE OF REASONS BRING
10 BEFORE THE JURY INCOMPETENT HEARSAY EVIDENCE. THAT IS
11 SPECIFICALLY PRECLUDED, PEOPLE VS. YOUNG. THE RULE WHICH
12 ALLOWS THE EXPERT TO STATE THE REASONS UPON WHICH OPINION
13 IS BASED MAY NOT BE USED AS A VEHICLE TO BRING BEFORE THE
14 JURY INCOMPETENT EVIDENCE.

15 EXPERTS MAY NOT RELATE AN OUT OF COURT
16 OPINION BY ANOTHER EXPERT AS INDEPENDENT PROOF. THEY
17 CANNOT REVEAL THE CONTENTS OF THAT OTHER OPINION.

18 THAT IS CLEARLY WHAT MR. HATFIELD WOULD BE
19 DOING IF HE TALKED ABOUT THE COUNTS THAT WERE MADE. HE
20 WOULD BE PRODUCING AN OPINION DONE BY SOMEBODY ELSE.
21 INTRODUCING IT BEFORE THE JURY. AND THE STATEMENT THAT
22 MR. BOUCHER SAYS, WELL, GEE, THAT MAY NEVER COME IN AS
23 EVIDENCE, THAT IS PRECISELY WHY MR. HATFIELD SHOULD NOT
24 BE ALLOWED TO USE THAT KIND OF INFORMATION, BECAUSE IT IS
25 NOT EVIDENCE.

26 IT WILL NEVER BE EVIDENCE. AND FOR HIM TO
27 SAY THAT HE HAS RELIED UPON THIS AND RECITE THAT
INFORMATION IN DETAIL BEFORE THE JURY CREATES EXACTLY THE

1 CONTRARY CONCLUSION AND CANNOT BE CURED BY A LIMITING
2 INSTRUCTION, AS THE GRIMSHAW CASE, THE MOSESIAN CASE
3 CITE, AND AGAIN AS JEFFERSON HIMSELF CITES.

4 SO NUMBER ONE, MR. HATFIELD SHOULD NOT BE
5 PERMITTED TO RELY UPON THIS HEARSAY EVIDENCE THAT IS NOT
6 OTHERWISE ADMISSIBLE. NUMBER TWO --

7 THE COURT: WELL, JUST FROM YOUR ARGUMENT YOU HAVE
8 NOT PRECLUDED A RELIANCE UPON IT. YOU HAVE PRECLUDED THE
9 RECITATION OF DETAILS BY YOUR OWN ARGUMENT.

10 SO ARE YOU SAYING THAT HATFIELD CAN SAY
11 THAT HE SENT THE SAMPLES TO A CERTAIN LAB, HE GOT THE
12 RESULTS, AND WITHOUT PULLING OUT THE CHART, AND
13 INDICATING EXACTLY WHAT WAS FOUND, IF HE COULD SAY TO HIS
14 SATISFACTION THAT THERE WAS A SHOWING THAT THERE WAS
15 ASBESTOS AT A CERTAIN LEVEL AND THAT THERE WAS
16 MONOKOTE-3, AND HE RELIED ON THAT, THOSE GENERALITIES, IN
17 COMING TO HIS OPINION, WITHOUT HAVING TO YOU PULL OUT A
18 CHART AS TO WHAT THINKS, DO YOU THINK HE COULD DO THAT?

19 MR. BIDERMAN: YOUR HONOR, NO, WE DO NOT BELIEVE
20 SO, IF IT IS NOT OTHERWISE GOING TO BE ADMISSIBLE, IF THE
21 INFORMATION WILL NOT OTHERWISE BE ADMISSIBLE. IT IS
22 DETAILED HEARSAY EVIDENCE.

23 THE COURT: IT'S NOT COMING OUT AS DETAILED
24 HEARSAY. IT IS COMING OUT IN CONCLUSIONARY FASHION.

25 MR. BIDERMAN: THAT THERE WERE JUST SOME COUNTS
26 MADE?

27 THE COURT: THERE WERE COUNTS MADE. HE MIGHT SAY
TO A GENERALITY OF AT LEAST THIS AMOUNT AND THAT WAS GOOD

1 ENOUGH FOR ME TO RELY UPON. I MEAN AS AN EXPERT, HE HAS
2 TO KNOW, HE HAS TO RELY ON A CERTAIN AMOUNT OF ASBESTOS,
3 I SUPPOSE, TO COME TO AN OPINION THAT THERE IS
4 CONTAMINATION.

5 MR. BIDERMAN: YOUR HONOR, THE PROBLEM IN THIS CASE
6 IS EXACTLY WHAT THE COURT POINTED OUT ON FRIDAY.
7 ESSENTIALLY, IT IS A ONE TO ONE ANALYSIS.

8 HE DOES NOT BRING ANYTHING TO BEAR OTHER
9 THAN THE FACT THAT HE'S DONE THESE DUST SAMPLES, SENDS
10 THEM BACK, AND THEN GETS THE RESULT. ESSENTIALLY HE'S
11 BEING USED AS A SUBSTITUTE FOR MR. MILLETTE, BECAUSE HIS
12 OPINION ON CONTAMINATION IS BASED ENTIRELY ON THESE
13 RESULTS. SO THERE IS A ONE TO ONE CORRESPONDENCE
14 BETWEEN --

15 THE COURT: LET ME ASK YOU, WHAT IS YOUR OBJECTION
16 TO THE BUSINESS RECORDS EXCEPTION?

17 MR. BIDERMAN: THE OBJECTION TO THE BUSINESS
18 RECORDS EXCEPTION IS, YOUR HONOR, THAT IT IS NOT A
19 BUSINESS RECORD. THE CASES HAVE HELD, WE HAVE CITED TWO
20 FEDERAL CASES FOR THE COURT --

21 THE COURT: IN YOUR PAPERS.

22 MR. DEFENSE: YES.

23 MR. BIDERMAN: THEY ARE, YOUR HONOR, THAT, AND
24 UNDER THE CALIFORNIA LAW THERE HAS TO BE AN INDEPENDENT
25 BASIS FOR THE TRUSTWORTHINESS OF THE COUNTS. IT IS
26 PREPARED IN CONNECTION WITH LITIGATION, FOR USE IN
27 LITIGATION. IT DOES NOT CONSTITUTE A BUSINESS RECORD.
IT IS AN INVOICE, A BILL OF LADING, THAT TYPE OF BUSINESS

1 RECORD DOCUMENT.

2 THE CUSTODIAN, YOUR HONOR, WAS NOT
3 DESIGNATED ON THEIR WITNESS LIST. IT WAS NOT DESIGNATED
4 AS AN EXPERT. AND ESSENTIALLY BY PERMITTING THE RESULTS
5 TO COME IN AS A BUSINESS RECORD WOULD BE TO CIRCUMVENT
6 ALL THE RULES GOVERNING THE DISCOVERY OF EXPERT
7 WITNESSES. WE THEN HAVE NO OPPORTUNITY TO HAVE ANY
8 CROSS-EXAMINATION ABOUT HOW THE COUNTS WERE PREPARED, HOW
9 THE SAMPLES WERE PREPARED, HOW THE SONICATION WAS DONE.

10 THERE IS NO OPPORTUNITY WHATSOEVER BECAUSE
11 THE RECORD COMES IN WITHOUT ANY INDEPENDENT ANALYSIS OR
12 REVIEW. THE PURPOSE FOR HAVING AN EXPERT DESIGNATION,
13 FOR HAVING EXPERT DEPOSITIONS IS SO THAT ONE CAN TEST THE
14 EXPERT'S OPINIONS. TO PERMIT THOSE IN AS A BUSINESS
RECORD WOULD ENTIRELY CIRCUMVENT THAT RULE.

15 YOUR HONOR, THE ANALYST IS NOT HERE. THE
16 PERSON WHO HAS ACTUALLY DONE THE ANALYSIS IS STILL NOT
17 HERE. IT IS SIMPLY SOMEBODY WHO WILL TALK ABOUT WHAT THE
18 RECORDS SAY. WE STILL HAVE NO OPPORTUNITY TO FIND OUT
19 HOW THOSE SAMPLES WERE PREPARED, HOW THE COUNTS WERE
20 MADE.

21 THE COURT: WELL, IT DOES NOT SOUND LIKE THAT IS
22 WHAT THEY HAVE.

23 DO YOU HAVE A CUSTODIAN OF THE RECORDS WHO
24 CAN TESTIFY AS TO THE METHOD BY WHICH THE ANALYSIS WAS
25 DONE IN GENERAL TERMS?

26 MR. BOUCHER: THAT'S CORRECT, AS WELL AS --

THE COURT: IN OTHER WORDS, IF THEIR LAB SAYS IT

1 WAS DONE UNDER X METHOD, THEN THIS PERSON IS FAMILIAR
2 WITH WHAT THAT METHOD IS AS FAR AS PROCEDURAL --

MR. BOUCHER: YES. AS WELL AS THE FACT THAT HE
4 HIMSELF PERFORMED QUALITY CONTROL ON THESE SAMPLES.

5 MR. BIDERMAN: AGAIN, YOUR HONOR, HE'S NOT ON THE
6 WITNESS LIST. IT IS -- BECAUSE DR. MILLETTE WAS REQUIRED
7 TO BE MADE AVAILABLE, A DATE WAS SET FOR HIS DEPOSITION.
8 HE DID NOT ATTEND HIS DEPOSITION. HE WAS NOT MADE
9 AVAILABLE ON THAT DATE. ESSENTIALLY, PLAINTIFFS ARE
10 BRINGING IN ANOTHER EXPERT WHO WAS UNDESIGNATED,
11 UNDEPOSED, AND IN CONTRAVENTION OF THE RULES THAT JUDGE
12 COOPERMAN SET UP FOR PRETRIAL DISCOVERY.

13 THE COURT: WELL, THERE ARE TWO THINGS THAT WE CAN
14 DO. I'M TRYING TO FIGURE OUT A SCHEDULE AT THIS POINT.
15 OBVIOUSLY, I WANT TO READ WHAT WE HAVE HERE, AND THAT'S
16 GOING TO DELAY THINGS. BUT EITHER I COULD READ THE
17 PORTION ABOUT THE BUSINESS RECORDS AND MAKE A DECISION ON
18 THAT, AND THAT WITNESS COULD BE TAKEN OUT OF ORDER IF I
19 DECIDE THAT THAT WAS PERMISSIBLE, OR WE COULD GO TO -- DO
20 YOU HAVE ANY OTHER DIRECT THAT YOU CAN HANDLE WITHOUT
21 GETTING INTO ANY PREVIOUS ANALYSIS ON OTHER CASES AS WELL
22 AS THIS CASE AT THIS POINT WITH MR. HATFIELD?

23 MR. BOUCHER: UMM --

24 THE COURT: HAS HE ESTABLISHED THAT, THE TAKING OF
25 THE SAMPLES?

26 MR. BOUCHER: NO. THAT'S THE NEXT PART OF THE
27 SLIDES. AND HE'S BROUGHT A CASSETTE TO SHOW THE JURY AND
DEMONSTRATE WHAT HE DOES.

1 THE COURT: I THINK UP TO TAKING THE SAMPLES, I
2 THINK WE COULD GO THAT FAR. WHAT WE COULD DO IS, I COULD
3 ORDER THAT WE BIFURCATE THE TESTIMONY AND ORDER CROSS UP
4 TO THAT POINT. AND THEN I COULD KEEP READING AND CROSS
5 COULD BE DONE ANYWAY ON WHAT HAS BEEN DONE SO FAR.

6 MR. MANFREDI: I'M JUST THINKING, AS YOU WERE
7 SAYING THAT, IT WOULD BE VERY DIFFICULT TO CROSS ON WHAT
8 HAS BEEN DONE BECAUSE THOSE PHOTOGRAPHS ARE TIED INTO THE
9 PLACES WHERE HE TOOK THE DUST SAMPLES AND SO FORTH, AND I
10 DON'T WANT TO BE IN A POSITION OF BEING ACCUSED OF
11 OPENING THE DOOR OF BY VIRTUE OF WHAT I HAVE ASKED ON
12 CROSS-EXAMINATION BECAUSE THE THINGS ARE RELATED, AND IT
13 IS GOING TO BE A DIFFICULT PROBLEM.

14 I WOULD URGE THE COURT TO PERHAPS TAKE THE
15 TIME TO READ THESE BRIEFS EVEN THOUGH WE HAVE A JURY
16 WAITING.

17 THE COURT: WELL, WHAT WE COULD DO IS, I'LL LOOK AT
18 THE COUPLE OF CASES. HOW LONG WOULD IT TAKE TO GO
19 THROUGH THE SAMPLING IF HE GOES THROUGH HIS TESTIMONY
20 ABOUT THE SAMPLES?

21 MR. BOUCHER: I THINK THERE IS A HALF HOUR, 45
22 MINUTES MAYBE OF DIRECT EXAMINATION, BECAUSE I'LL ALSO
23 ASK HIM ABOUT HIS WORK ON THE A.S.D.M. COMMITTEE, ABOUT
24 SONICATION AND CERTAIN ISSUES RELATED TO THAT AS IT
25 RELATES TO HIS TESTIMONY. YOU KNOW, HALF HOUR, 45
26 MINUTES PROBABLY WITHOUT ANY PROBLEM.

27 MR. MANFREDI: YOUR HONOR, ON THE OTHER HAND, WHAT
IS THE RELEVANCE OF ANY OF THIS IF YOU CONCLUDE THAT

1 THOSE SAMPLES MAY NOT BE USED, CANNOT COME INTO EVIDENCE?
2 I MEAN WE ARE GETTING FURTHER AND FURTHER DOWN THE ROAD
3 ON SOMETHING WE BELIEVE, VERY VERY STRONGLY BELIEVE IS
4 NOT ADMISSIBLE.

5 THE OTHER POINT THAT I WOULD MAKE IS THAT
6 WITH RESPECT TO THIS 45 MINUTES OR WHATEVER, I CERTAINLY
7 HOPE THAT THERE IS GOING TO BE NO TESTIMONY ABOUT WHAT
8 THIS WITNESS DID OVER THE WEEKEND. WE DID TAKE HIS
9 DEPOSITION, YOUR HONOR, CAREFULLY. HE TESTIFIED AMONG
10 OTHER THINGS AT THAT DEPOSITION THAT WHILE HE IS A LIGHT
11 MICROSCOPIST, HE IS NOT A TRANSMISSION ELECTRON
12 MICROSCOPIST.

13 FOR HIM NOW TO COME IN HERE, AND AFTER
14 GOING BACK TO CAROLINA THIS WEEKEND, AND CLAIM TO HAVE
15 LOOKED THROUGH THE MICROSCOPE AND DONE THESE COUNTS
16 HIMSELF, SOMETHING WHICH HE HAD NOT DONE WHEN WE HAD
17 DISCOVERY FOR HIM ON THE LAST DAY OF DISCOVERY --

18 THE COURT: DO YOU HAVE TO BE CERTIFIED OR DO YOU
19 HAVE TO HAVE A CERTAIN BACKGROUND TO DO THAT?

20 MR. BOUCHER: NOT TO DO THE COUNTS ON THE -- YOU
21 HAVE TO HAVE CERTIFICATION AND EXPERT BACKGROUND IN ORDER
22 TO OPERATE THE ELECTRON MICROSCOPE. BUT THE ELECTRON
23 MICROSCOPE ACTUALLY TAKES A PICTURE ON THE X-RAY
24 DISPERSION THAT SHOWS THE FIBER ITSELF THAT YOU DON'T
25 HAVE TO HAVE THE T.E.M. BACKGROUND IN ORDER TO ANALYZE
26 AND UNDERSTAND.

27 THE COURT: SO THERE ARE PHOTOS OF WHAT DR.
MILLETTE WOULD HAVE EVALUATED THAT EXIST?

1 MR. BOUCHER: YES, YOUR HONOR, ESSENTIALLY.

2 MR. MANFREDI: NOT THAT HAVE BEEN PRODUCED TO US.
3 THERE ARE NOT.

4 THERE ARE COUNT SHEETS IN WHICH A
5 MICROSCOPIST SITS AT THE ELECTRON MICROSCOPE, COUNTS THE
6 ASBESTOS STRUCTURES, MARKS THEM DOWN, MARKS DOWN THEIR
7 LENGTH AND THEIR WIDTH, AND THERE IS AN ANALYST THAT DOES
8 THAT, DID THAT, FAXED IT TO MR. HATFIELD.

9 WE EXAMINED HIM ABOUT IT AT HIS DEPOSITION,
10 FOUND OUT HE HAD NOT DONE ANY OF THE WORK, HAD NOT BEEN
11 IN FRONT OF THE MICROSCOPE. IT HAD BEEN FAXED TO HIM,
12 DONE BY SOMEONE ELSE NOT THERE. NOW HE GOES BACK TO
13 CAROLINA DURING HIS TRIAL, DURING HIS EXAMINATION, AND
14 SITS IN FRONT OF THE MICROSCOPE AND DOES THIS WORK.

HOW DOES THAT COMPLY WITH THE EXPERT
16 DISCOVERY RULES? HOW DOES THAT FAIRLY PROTECT OUR RIGHTS
17 TO CROSS EXAMINE AND TO DO DISCOVERY? YOUR HONOR, THEY
18 HAVE HAD THE MICROSCOPY AVAILABLE SINCE THIS WORK WAS
19 DONE. FOR REASONS UNKNOWN TO US, THEY RESIST BRINGING
20 THE PERSON WHO COULD LAY FOUNDATION FOR THIS WORK. THEY
21 BRING LONGO OUT HERE. THEY BRING HATFIELD OUT HERE.

22 THE COURT: WELL, I KNOW WHY MR. MILLETTE IS NOT
23 HERE, BECAUSE THEY DID NOT APPARENTLY PRODUCE HIM IN TIME
24 AND YOU TACTICALLY DO NOT WANT HIM IN HERE. THAT'S
25 UNDERSTANDABLE.

26 MR. MANFREDI: THEY HAD TWO MICROSCOPISTS UNTIL THE
27 DAY OR TWO BEFORE THEIR DEPOSITIONS. THEY SAID WE DO NOT
3 KNOW WHO TO CALL, MILLETTE OR HOPEN. THE DISCOVERY CUT

1 OFF CAME AND WENT, AND THEY PRODUCED NEITHER OF THEM.
2 AND NOW WE DON'T HAVE THE PERSON WHO DID THE WORK, AND
3 THIS IS COMING IN THE BACK DOOR.

4 BUT IT ADDS INSULT TO INJURY TO ALLOW THIS
5 MAN, WHO TESTIFIED HIMSELF AT HIS DEPOSITION THAT HE IS
6 NOT A ELECTRON MICROSCOPIST, TO GO BACK THERE IN THE
7 MIDDLE OF HIS TESTIMONY, DO ADDITIONAL WORK AND COME BACK
8 HERE AND TESTIFY.

9 THE COURT: WELL, I WOULD SAY ON ITS FACE IT LOOKS
10 LIKE MR. HATFIELD COULD NOT TESTIFY TO GOING BACK THERE
11 DURING THE TRIAL AND MAKING COUNTS, BECAUSE THAT WAS
12 TOTALLY UNANTICIPATED. I THINK IT WAS A WHOLE DIFFERENT
13 AREA OF EXPERTISE THAT HE WOULD SEEM TO BE INVOLVED IN.
14 SO ON ITS FACE I WOULD SAY HE'S NOT GOING TO TESTIFY, I
15 WOULD PRECLUDE IT AT THIS POINT, ANY TESTIMONY OF ACTUAL
16 COUNTS BY HIMSELF OF ANY OF THE EVIDENCE IN THIS CASE.

17 MR. BOUCHER: BASED ON WHAT GROUNDS, YOUR HONOR?
18 BECAUSE THE ONLY THING HE DID IS HE WENT BACK, AND JUST
19 FOR THE PURPOSES OF LAYING THE FOUNDATION FOR THE ACTUAL
20 TEST TO COME IN, WHICH IS BEYOND WHAT WE FEEL IS
21 NECESSARY AND BEYOND WHAT IS PERMITTED UNDER SECTION 801.

22 I MEAN THERE ARE TWO VERY SEPARATE ISSUES
23 AND, AS THE DEFENDANTS AMPLY LAY OUT IN THEIR BRIEF, AND
24 AS THEIR CASES INCLUDING GRIMSHAW AND SO FORTH INDICATE,
25 AN EXPERT CAN RELY UPON INADMISSIBLE HEARSAY AND INDICATE
26 TO THE JURY THAT HE'S RELYING UPON INADMISSIBLE HEARSAY
27 AND RELATE IN GENERAL TERMS WHAT THAT IS.

BUT TO LAY THE FOUNDATION, MR. HATFIELD

1 WENT OUT AND LOOKED AT THE ACTUAL ANALYSIS ITSELF, WHICH
2 IS WHAT I'M SHOWING THE COURT. IT'S AN EXAMPLE OF
3 SOMETHING THAT IS ALREADY IN EVIDENCE THROUGH DR. COHEN,
4 BUT THAT IS AN X-RAY DISPERSION OF WHAT HAPPENS WHEN THE
5 MICROSCOPE FOCUSES ON IT. IT COMES UP ON AN X-RAY
6 SCREEN, AND THIS TYPE OF PATTERN COMES UP.

7 AND MR. HATFIELD IS IN FACT QUALIFIED TO
8 TESTIFY ABOUT IT. AND WHAT IT SHOWS -- AND IN FACT, MR.
9 MILLETTE WORKED UNDER THE DIRECTION OF MR. HATFIELD AT MC
10 CRONE LABORATORIES PRIOR TO MR. HATFIELD THEN MOVING ON
11 TO LAW ENGINEERING OR LAW ASSOCIATES. SO THE ONLY THING
12 HE DID THIS WEEKEND WAS SATISFY HIMSELF FROM THE
13 FOUNDATIONAL POINT OF VIEW OF THE ACTUAL COUNTS. BUT
14 THAT GOES ON --

THE COURT: YOU'RE SAYING THAT HE CAN TESTIFY TO
15 THAT IN FRONT OF THE JURY?

16 MR. BOUCHER: HE'S QUALIFIED TO NOW.

17 THE COURT: WHAT IS HIS CERTIFICATION AGAIN? WHAT
18 IS HIS PROFESSIONAL TITLE?

19 MR. BOUCHER: MR. HATFIELD IS VICE PRESIDENT-
20 CONSULTANT AT LAW ASSOCIATES. AND HE'S GOT A BACKGROUND
21 IN POLARIZED LIGHT MICROSCOPY, BUT ADDITIONALLY HE, AS I
22 THINK THERE HAS ALREADY BEEN TESTIMONY ABOUT, HE IS ON
23 THE A.S.D.M. COMMITTEE AND THE E.P.A. COMMITTEE BY
24 APPOINTMENT DECIDING THIS EXACT PROTOCOL, AND IS MAKING A
25 DETERMINATION OF EXACTLY HOW THIS PROCESS IS UTILIZED AND
26 SO FORTH. AND HE'S TAUGHT THIS AT UNIVERSITIES AROUND
27 THE COUNTRY.

1 THE COURT: NO, BUT THE POINT IS IN DISCOVERY IF
2 YOU DID NOT DESIGNATE HIM AS A PERSON WHO IS GOING TO
3 TESTIFY TO THE ACTUAL COUNTS AND TO THE MICROSCOPY WORK,
4 THEN THERE WOULD HAVE BEEN NO DISCOVERY ABOUT THAT AND
5 THERE WOULD BE NO PRIOR ABILITY TO CROSS EXAMINE IN THAT
6 AREA.

7 MR. BOUCHER: YOUR HONOR, AT THE DEPOSITION THEY
8 DID EXACTLY QUESTION HIM ABOUT SONICATION. THEY
9 QUESTIONED HIM ABOUT THESE COUNTS. THEY TOOK HIM THROUGH
10 THE COUNT SHEETS AND HAD HIM DISCUSS AND ANALYZE THE
11 COUNTS SHEETS. THEY ASKED HIM HIS OPINIONS ABOUT THE
12 NUMBER OF ASBESTOS FIBERS. THEY WENT IN DEPTH WITH HIM
13 ON HIS DEPOSITION ABOUT THESE EXACT POINTS.

14 THE COURT: NOT ABOUT VIEWING IT, HIM PERSONALLY
15 PHYSICALLY VIEWING IT UNDER A MICROSCOPE AND VERIFYING
16 THE COUNTS.

17 I CAN UNDERSTAND THEM GOING THROUGH ANY
18 COUNTS THAT WERE THE BASIS OF HIS OPINION. THAT WOULD BE
19 NORMAL. BUT IT'S RATHER A SURPRISE FOR THEM TO COME HERE
20 AND FIND OUT THAT OVER THE WEEKEND THEY HAVE ANOTHER AREA
21 TO CROSS EXAMINE HIM ABOUT THAT THEY WERE NOT AWARE TO BE
22 PREPARED ON AND HE OBVIOUSLY WAS NOT PREPARED UNTIL THIS
23 WEEKEND.

24 MR. BOUCHER: AGAIN, YOUR HONOR, THE ONLY THING HE
25 DID WAS GO THROUGH, VIEW THE COUNTS FOR FOUNDATIONAL
26 PURPOSES. AND WE AGAIN BELIEVE THAT IS BEYOND WHAT IS
27 NECESSARY, BUT WE JUST DID IT OUT OF AN ABUNDANCE OF
CAUTION. HE WAS DESIGNATED AS A PERSON WHO WOULD TESTIFY

1 ABOUT SAMPLE ANALYSIS AND ANALYTICAL PROCEDURES.

2 THE COURT: I WOULD THINK HE'D HAVE TO KNOW
3 SOMETHING ABOUT THE ANALYTICAL PROCEDURES TO RELY UPON
4 THE RESULTS AS AN EXPERT ON THE ISSUE OF CONTAMINATION.
5 HE'D HAVE TO UNDERSTAND THE RESULTS.

6 IN OTHER WORDS, IF HE GETS IT FROM THE LAB,
7 HE'D HAVE TO KNOW WHAT TECHNIQUE THEY USED. IS IT A
8 REPUTABLE TECHNIQUE? IS IT SOMETHING HE SHOULD RELY ON
9 AS AN EXPERT? THAT'S ALL WELL AND GOOD. BUT I'M WILLING
10 TO GO WITH THE SAMPLING PORTION OF THE TESTIMONY.

11 I'LL HEAR FROM MR. MANFREDI.

12 MR. MANFREDI: YES. MR. BOUCHER HELD UP SOME
13 THINGS, OF COURSE, THAT WE'RE NOT PRIVY TO SINCE THEY
14 WERE NEVER PRODUCED TO US, ALLEGEDLY WORK THAT THE
15 WITNESS DID OVER THE WEEKEND.

16 THESE ARE WHAT THEY CALL COUNT SHEETS.
17 THESE WERE PRODUCED AT THE WITNESS'S DEPOSITION. AS YOU
18 WILL SEE, THE ANALYST IS A.T.C. OR R.K.W. WHO WAS LOOKING
19 THROUGH THE ELECTRON MICROSCOPE, GIVES THE GRADE, GIVES
20 THE OVERALL STRUCTURE, LENGTH AND WIDTH, GIVES WHAT TYPE
21 OF ASBESTOS IT IS, AND SO FORTH, AND THEN TELLS YOU
22 WHETHER IT IS A MATRIX FIBER OR BUNDLE OR WHATEVER.
23 THESE WERE PRODUCED AT THE DEPOSITION, AND OF COURSE WE
24 ASCERTAINED AT THE DEPOSITION MR. HATFIELD DID NONE OF
25 THIS.

26 NOW, WHAT THEY HELD UP HERE WAS SOMETHING
27 VERY DIFFERENT. THAT IS AN ELEMENTAL READOUT DONE ON AN
ELECTRON MICROSCOPE AS X-RAY DEFFRACTION. THAT IS NOT A

1 COUNT OF FIBERS. NOW, I DON'T KNOW WHAT HE DID OVER THE
2 WEEKEND, BUT WHAT THEY ARE TALKING ABOUT THERE AND WHAT
3 -- MR. BOUCHER VERY CAREFULLY SEVERAL TIMES USED THE WORD
4 VERMICULITE -- I ASSUME WHAT THEY DID THERE WAS TO
5 ANALYZE A PIECE OF THE SUBSTANCE IN ORDER TO ASCERTAIN
6 WHAT WAS IN THERE AS A MATTER OF CONTENT.

7 THAT IS SOMETHING, OF COURSE, WE HAVE NEVER
8 HEARD ANYTHING ABOUT FROM THE WITNESS. AND ALL I'M
9 SAYING IS THAT WHAT IS BEING SHOWN THERE IS NOT THE COUNT
10 SHEETS. THAT IS A TOTALLY DIFFERENT SCIENTIFIC TEST,
11 X-RAY DEFFRACTION ANALYSIS, THAN SIMPLY LOOKING AT A
12 PORTION OF ONE OF THESE GRIDS THAT HAS BEEN PREPARED AND
13 COUNTING THE NUMBER OF ASBESTOS STRUCTURES ON THE GRADE.

14 I JUST WANT TO MAKE SURE THAT THE WITNESS
15 DOES NOT, WHATEVER WE DO, THE WITNESS DOES NOT GO INTO
16 THAT WORK BECAUSE IT IS SOMETHING ON WHICH WE HAVE NO
17 DISCOVERY.

18 THE COURT: WELL, I WOULD TEND TO AGREE THAT ANY
19 EVALUATION OVER AND ABOVE WHAT WAS DISCLOSED AT THE
20 DEPOSITION THAT WAS DONE OVER THE WEEKEND BY MR.
21 HATFIELD, ESPECIALLY AS TO CONTENTS OF THE PRODUCT OR
22 SAMPLES THAT WAS NOT PREVIOUSLY DISCLOSED, WOULD NOT
23 APPEAR TO BE IN COMPLIANCE WITH THE DISCOVERY STATUTES
24 THAT GO INTO THAT MEMO.

25 MR. BOUCHER: WELL, JUST FOR THE RECORD, AGAIN,
26 YOUR HONOR, WE WEREN'T ATTEMPTING TO GET BEYOND ANY
27 DISCOVERY STATUTES.

AND THE COURT ASKED ME A SPECIFIC QUESTION,

1 AND THAT IS WHETHER OR NOT MR. HATFIELD WAS QUALIFIED TO
2 ANALYZE UNDER THE T.E.M. ANALYSIS. AND THE EXAMPLE THAT
3 I SHOWED THE COURT WAS AN X-RAY DISPERSAL ANALYSIS THAT
4 HE IS QUALIFIED TO ANALYZE. THAT'S THE ONLY REASON FOR
5 HOLDING THAT UP. AGAIN, THIS IS SIMPLY FOUNDATION. IT
6 IS NOT ANYTHING OTHER THAN FOUNDATION. BUT WE HAD HIM DO
7 THAT SIMPLY AS A PRECAUTIONARY MEASURE.

8 THE COURT: WELL, I'M INCLINED TO ALLOW THE
9 TESTIMONY AT THIS POINT OF THE SAMPLING AND THE SHOWING
10 OF THE SLIDES REGARDING WHERE THE SAMPLING WAS TAKEN AND
11 VERIFICATION OF WHATEVER REPORTS HE HAS AS TO HIS
12 NOTATIONS, AS TO SAMPLE ONE WAS TAKEN FROM X OR WHATEVER
13 AND PRESERVED IN A CERTAIN WAY, WITHOUT GETTING INTO
14 WHETHER OR NOT HE SENT IT ANYWHERE, BECAUSE I'M SURE IN
15 ONE FELL SWOOP HE CAN TESTIFY LATER THAT I TOOK ALL THE
16 SAMPLES AND BOXED THEM OR WHATEVER I'M SUPPOSED TO DO TO
17 SECURE THEM AND I SENT THEM TO THE LABORATORY AND I GOT
18 THE RESULTS BACK.

19 SO WE CAN GO THROUGH THE PHYSICAL SAMPLING
20 ONLY. I WILL PRECLUDE ANY REFERENCE TO ANY WEEKEND
21 FURTHER ACTIVITIES BY MR. HATFIELD REGARDING MICROSCOPIC
22 ANALYSIS OR COUNTS, VERIFICATION OF COUNTS BY HIM
23 PERSONALLY AT THE LAB. AND I WILL, ONCE WE FINISH THAT
24 PORTION OF THE TESTIMONY, THEN I'LL BREAK FOR LUNCH AND
25 I'LL READ THROUGH THE BRIEFS AND HOPEFULLY AT 1:30 MAKE
26 THE DECISION.

27 MR. BOUCHER: THE OTHER THING I CAN DO, YOUR HONOR,
28 IS ASK HIM HOW THESE TYPES OF SAMPLES ARE TYPICALLY